109

No. 08-345

Supreme Court, U.S.
FILED
OCT 17 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF ALABAMA, et al.,

Petitioners,

v.

TIMOTHY D. POPE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND 26 OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

ROBERT F. MCDONNELL
Attorney General of Virginia

STEPHEN R. MCCULLOUGH
State Solicitor General
Counsel of Record

WILLIAM C. MIMS
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the Commonwealth of Virginia

October 17, 2008

[Additional Counsel Listed On Inside Of Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TERRY GODDARD
Arizona Attorney General

JOHN W. SUTHERS
Colorado Attorney General

BILL MCCOLLUM
Florida Attorney General

THURBERT E. BAKER
Georgia Attorney General

MARK J. BENNETT
Hawaii Attorney General

LAWRENCE G. WASDEN
Idaho Attorney General

STEVE CARTER
Indiana Attorney General

DOUGLAS F. GANSLER
Maryland Attorney General

MARTHA COAKLEY
Massachusetts Attorney General

MICHAEL A. COX
Michigan Attorney General

MIKE MCGRATH
Montana Attorney General

JON C. BRUNING
Nebraska Attorney General

CATHERINE CORTEZ MASTO
Nevada Attorney General

ANNE MILGRAM
New Jersey Attorney General

WAYNE STENEHJEM
North Dakota Attorney General

NANCY H. ROGERS
Ohio Attorney General

W.A. DREW EDMONDSON
Oklahoma Attorney General

HARDY MYERS
Oregon Attorney General

THOMAS W. CORBETT, JR.
Pennsylvania Attorney General

HENRY MCMASTER
South Carolina Attorney General

LAWRENCE E. LONG
South Dakota Attorney General

ROBERT E. COOPER, JR.
Attorney General and Reporter of Tennessee

GREG ABBOTT
Attorney General of Texas

MARK L. SHURTLEFF
Utah Attorney General

DARRELL V. MCGRAW, JR.
West Virginia Attorney General

BRUCE A. SALZBURG
Wyoming Attorney General

QUESTION PRESENTED

Whether a litigant who requests and obtains the same relief as the party from whom he seeks attorneys' fees—and whose interests are therefore aligned with those of the would-be fee payer—is a "prevailing party" entitled to fees within the meaning of federal fee-shifting statutes.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

SUMMARY OF THE ARGUMENT 2

I. THIS COURT SHOULD GRANT CERTIORARI TO RESTORE CLARITY TO THE LAW 4

A. The States need to know at the outset of litigation when and under what circumstances they risk exposure to attorneys' fees 4

B. Lack of clarity promotes needless litigation 6

II. THE SITUATION PRESENTED IN THE PETITION IS ONE THAT THE STATES EXPERIENCE WITH GREAT FREQUENCY 8

III. AWARDING ATTORNEYS' FEES AGAINST A STATE THAT WAS ALIGNED WITH THE FEE CLAIMANT WOULD CONTRADICT THE PURPOSES BEHIND ATTORNEYS' FEE-SHIFTING STATUTES 12

A. The "private attorney general" rationale does not apply when the State seeks the same relief sought by an aligned private litigant 12

TABLE OF CONTENTS – Continued

Page

B. The notion of "just desserts" cannot justify a fee award when the State has not violated the rights of the aligned party 13

IV. THE REASONING OF THE EIGHTH AND ELEVENTH CIRCUITS LACKS ANY HISTORICAL BASIS AND CONTRAVENES CONGRESSIONAL INTENT 15

A. The reasoning of the Eighth and Eleventh Circuits ignores the historical backdrop against which attorneys' fee-shifting statutes were enacted 15

B. Congress makes its intent plain when departing from longstanding practice ... 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Action on Smoking & Health v. Civil Aeronautics Bd., 724 F.2d 211 (D.C. Cir. 1984) 6

Allstate Ins. Co. v. Abbott, 495 F.3d 151 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008) 10

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) 15, 16

Bigby v. City of Chicago, 927 F.2d 1426 (7th Cir. 1991) 6

Blum v. Stenson, 465 U.S. 886 (1984) 4

Brooks v. Vassar, No. 3:99cv755 (E.D. Va. 2008) 4

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 14

Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) 11

Firebird Soc'y v. Members of the Bd. of Fire Comm'rs, 556 F.2d 642 (2nd Cir. 1977) 6

Hensley v. Eckerhart, 461 U.S. 424 (1983) 6, 15, 18

Jenkins v. Missouri, 73 F.3d 201 (8th Cir. 1996) 5, 7

TABLE OF AUTHORITIES – Continued

Page

Kentucky v. Graham,
473 U.S. 159 (1985) 14

Marek v. Chesny,
473 U.S. 1 (1985) 8

Missouri v. Jenkins,
491 U.S. 274 (1989) 4

New York State Bd. of Elections v. Lopez-Torres,
128 S. Ct. 791 (2007) 10

Ruckelshaus v. Sierra Club,
463 U.S. 680 (1983) 14, 15, 17

Sole v. Wyner,
127 S. Ct. 2188 (2007) 14

Stotts v. Memphis Fire Dep't,
679 F.2d 541 (6th Cir. 1982) 10

Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,
489 U.S. 782 (1989) 12

United States v. Flowers,
No. 07-14854, 2008 WL 2440028
(11th Cir. June 18, 2008) 5

STATUTES

15 U.S.C. § 2605(c)(4)(A)(i) 17

20 U.S.C. § 1415(i)(3)(B) 8

33 U.S.C. § 1365(d) 9

42 U.S.C. § 1973*l*(e) 8

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1988 .....8, 12, 14, 15, 16

42 U.S.C. § 2000a-3(b).....8

42 U.S.C. § 2000b-1 8

42 U.S.C. § 2000e-5(k).....8

42 U.S.C. § 7607(f).....9

42 U.S.C. § 12205 8

LEGISLATIVE HISTORY

H. Rep. No. 94-1558 (1976) 12, 13, 14

S. Rep. No. 94-1011 (1976) 12-14

122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney).....13

122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy) 18

122 Cong. Rec. 35128 (1976) (remarks of Rep. Seiberling) 13

OTHER AUTHORITY

Lindsay Fortado, *Hourly Billing Rates Continue to Rise*, National Law Journal, Dec. 12, 2005 4

Alan Hirsch & Diane Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation (Federal Judicial Center, 2d ed. 2005).....8

Leigh Jones, *Law Firms Continue to Raise Rates*, National Law Journal, Dec. 6, 2006.....4

TABLE OF AUTHORITIES – Continued

Page

Lynne Marek, *State AG Offices Struggle with Cuts*, National Law Journal, Sept. 15, 2008 1

Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550 (2006) 9

Ruth Singleton, *Billing Rates Remain High*, National Law Journal, Dec. 16, 2002 4

INTEREST OF AMICI[1]

The question presented in the petition is one of considerable importance and practical significance to the States. Several points are indisputable. First, as frequent litigants in the courts of the United States, the States are exposed to a wide range of attorneys' fee-shifting statutes. Second, attorneys' fee awards often involve substantial sums. Third, particularly at a time of great budgetary strain,[2] the States would rather devote their limited resources to solving real problems than litigating about attorneys' fees. Moreover, protracted fee litigation and improper fee awards will deter the States from vigorously enforcing state and federal law. Finally, and importantly here, during the course of litigation, the States' interests often are aligned with those of a variety of other private litigants.

Under the law in three Circuits, the States are exposed to attorneys' fees only if they lose. In contrast, under the emergent view adopted by the Eighth and Eleventh Circuits, the States perversely

---

[1] Counsel for Virginia by written letter has informed counsel for the parties of its intent to file this brief.

[2] The National Conference of State Legislatures noted in April 2008, in its State Budget Update, that, "[w]ith a few exceptions, state finances are deteriorating, in some cases considerably." Available at: http://www.ncsl.org/programs/fiscal/sbu200804.htm. These cuts have had a considerable impact on many State Attorneys' General. *See* Lynne Marek, *State AG Offices Struggle with Cuts*, National Law Journal, Sept. 15, 2008.

face exposure to attorneys' fees from an aligned party even if they win. This state of confusion requires state litigants to focus on fee exposure rather than the merits of the controversy.

The States urge this Court to grant the petition for certiorari to resolve this important issue and to restore needed clarity to the law.

SUMMARY OF THE ARGUMENT

The Petition should be granted for several reasons. First, the States need clarity in this area of the law. Put simply, the States need to know with some certainty when and under what circumstances they can be subjected to attorneys' fee awards. Attorneys' fees can represent a considerable expense. In addition, disputes about attorneys' fees often become "second major litigation[s]"—and add a second layer of expense—for the States. Clarity in the law regarding exposure to attorneys' fees thus is absolutely critical for the States. At present, the Circuits are divided on the issue of whether an aligned party can recoup fees from the State, even where the State requests the very same relief as the aligned party and even where the State prevails in that request. This uncertainty promotes protracted satellite litigation on the issue of fees that bogs down the judicial process and consumes scarce state resources.

Second, the question presented can be expected to recur with great regularity. States are frequent litigants in a variety of cases involving, for instance, law-enforcement, corrections, education, and environmental laws. In these and many other areas, Congress has enacted fee-shifting statutes. So too, in these and other areas, States often find themselves subject to long-running and multi-faceted injunctions and decrees that, from time to time, need to be modified or abrogated. Finally, in litigating these cases, States often find themselves aligned with other litigants. These cases are fertile ground for fee litigation, and the Eleventh Circuit's rule—under which aligned parties may seek fees from the State even though the State has prevailed—threatens to expand fee litigation exponentially.

Third, awarding fees against an aligned party contradicts the purposes underlying attorneys' fee statutes. The primary purpose behind fee-shifting is to ensure that a litigant can secure a champion in the courts. That rationale does not apply when a State is advocating for the same relief. Another justification for fee-shifting is that the wrongdoer should be made to pay for violating the rights of another. Where a State prevails, and has advocated a position that benefits the fee claimant, the State has not wronged that same fee claimant.

Finally, awarding fees against an aligned, prevailing party is inconsistent with the two dominant paradigms for fee-shifting and the congressional intent that underlies these statutes:

the "American Rule," where each litigant covers his own attorneys' fees, and the "English Rule," where fees frequently are shifted to the loser. Awarding fees against a party that is litigating *alongside* the fee seeker fits neither paradigm. Had Congress intended such a radical departure from these historical models, it would have made its intent clear.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESTORE CLARITY TO THE LAW.

A. The States need to know at the outset of litigation when and under what circumstances they risk exposure to attorneys' fees.

It is crucial for any litigant, and particularly the States, to know from the outset of litigation about exposure to attorneys' fees. Attorneys' fees can be significant[3] and, in fact, can dwarf any damages

[3] For example, the State of Virginia presently is litigating a claim of attorneys' fees totaling $716,478. *Brooks v. Vassar*, No. 3:99cv755 (E.D. Va. 2008). Attorneys' fees can be assessed based on a "prevailing rate." *Blum v. Stenson*, 465 U.S. 886, 889 (1984); *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989) ("Our cases have repeatedly stressed that attorneys' fees . . . are to be based on market rates for services rendered."). These rates, of course, consistently have risen over the years. *See* Lindsay Fortado, *Hourly Billing Rates Continue to Rise*, National Law Journal, Dec. 12, 2005; Leigh Jones, *Law Firms Continue to Raise Rates*, National Law Journal, Dec. 6, 2006; Ruth Singleton, *Billing Rates Remain High*, National Law Journal, Dec. 16, 2002 (noting that "[a]lthough not huge, increases are the norm").

award. Exposure to attorneys' fees can affect the way a State responds to litigation or even whether the State initiates litigation. For example, a State may find it tactically wise to settle a case, even when the State believes its position is meritorious, simply to avoid the risk of a substantial fee award. Similarly, a State may decline to file or intervene in an action it believes is meritorious if doing so risks a large attorneys' fee award.

Although exposure to attorneys' fees is an important concern for any litigant, these concerns are magnified for the States. As further explained below, the States frequently must litigate in federal court to defend state statutes and regulations or to seek the modification or termination of long-running injunctions and decrees. In many frequently litigated areas, such as corrections, housing, and the environment, Congress has enacted fee-shifting statutes. In litigating these cases, the States frequently find themselves aligned with, and litigating alongside, another party. Therefore, the issue presented by the petition is of great consequence to the States.

While the States need clarity, at present, the Circuits are divided on the question of whether an aligned, prevailing party can be made to pay attorneys' fees. In the Eighth and Eleventh Circuits, a plaintiff can obtain attorneys' fees against an aligned state party who prevailed. *United States v. Flowers*, No. 07-14854, 2008 WL 2440028 (11th Cir. June 18, 2008); *Jenkins v. Missouri*, 73 F.3d 201, 204

(8th Cir. 1996). In contrast, in the Second, Seventh, and D.C. Circuits, a litigant who is aligned with the prevailing state party cannot recoup attorneys' fees. *Firebird Soc'y v. Members of the Bd. of Fire Comm'rs*, 556 F.2d 642, 643-44 (2nd Cir. 1977); *Bigby v. City of Chicago*, 927 F.2d 1426, 1429 (7th Cir. 1991); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 724 F.2d 211, 216 (D.C. Cir. 1984).

The question that the petition presents thus is important to the States and ripe for decision. This Court should grant the petition for a writ of certiorari to clarify the law.

B. Lack of clarity promotes needless litigation.

Clarity in the law governing attorneys' fees is important not only so a State can know whether to settle, to intervene, or even to file a lawsuit in the first place, but also so a State can avoid needless collateral litigation on the issue of attorneys' fees. This Court has emphasized the need to avoid turning disputes about attorneys' fees into "second major litigation[s]." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). Until this Court resolves the issue, the States will continue to face claims by aligned parties that they are entitled to fees, even with respect to issues in which the State prevailed.

The amorphous standards employed by the Eighth and Eleventh Circuits inevitably will encourage "second major litigation" at the district

court level. These vague standards provide a powerful incentive for the fee claimant to seek fees and then, if necessary, to appeal any adverse decision by the district court. The Eleventh Circuit concluded that the intervening plaintiff was entitled to fees because his "contribution was a substantial force" in the district court's decision. Pet. App. 5a. Establishing what constitutes a "substantial force" in a court's decision is hardly subject to ready determination. Every aligned litigant will make such claims which the States will have no choice but to oppose. These disputes will be time-consuming and will require courts to make difficult analyses of hotly contested facts.

The standard employed by the Eighth Circuit is no better. Plaintiffs who seek the same relief as the State are entitled to fees because intervening parties need a "means for paying their attorneys" in cases where litigation "can continue for years and affect nearly everyone in the community." *Jenkins*, 73 F.3d at 204 n.3. The Eighth Circuit also reasoned that fees are justified when a type of litigation "seldom results in a monetary recovery." *Id.* Although *Jenkins* dealt with school desegregation litigation, the open-ended criteria applied by the Eighth Circuit cover a variety of situations. In the States' view, when a litigant is aligned with the State and has requested the same relief, that aligned litigant is not entitled to attorneys' fees from the State. A contrary rule—or even uncertainty—will essentially ensure a proliferation of "second major litigation" on attorneys' fees. The

States urge the Court to grant certiorari to avoid that circumstance.

II. THE SITUATION PRESENTED IN THE PETITION IS ONE THAT THE STATES EXPERIENCE WITH GREAT FREQUENCY.

Congress has enacted a wide variety of statutes that deviate from the American Rule and authorize a court to award attorneys' fees to prevailing plaintiffs. By one estimate, Congress has enacted more than 200 such statutes. Alan Hirsch & Diane Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation (Federal Judicial Center, 2d ed. 2005). *See also Marek v. Chesny*, 473 U.S. 1, 44-51 (1985) (appendix to opinion of Brennan, J., dissenting). These statutes allow fee-shifting in areas that the States litigate frequently.

The States constantly are engaged in defending their statutes and regulations from constitutional challenges under, for example, the Eighth Amendment, the First Amendment, and the Fourth Amendment cases involving prisons, law-enforcement, mental-health facilities, and schools. Several statutes authorize fee-shifting for this recurring litigation. *See* 42 U.S.C. § 1988 and 42 U.S.C. §§ 2000a-3(b), 2000b-1, 2000e-5(k).[4]

---

[4] *See also* 42 U.S.C. § 12205 (Americans with Disabilities Act); 42 U.S.C. § 1973*l*(e) (Voting Rights Act); 20 U.S.C. § 1415(i)(3)(B) (Individuals with Disabilities Education Act).

Often, these cases—and the fee requests that accompany them—result in comprehensive and continuing injunctions or consent decrees. Although the number of federal injunctions and decrees cannot be determined with certainty, there is no doubt that they are a staple of modern litigation. *See* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 629 (2006) (noting the existence of "thousands of federal consent decrees that currently exist"). As time passes, and as the decrees become factually or legally outdated, the States inevitably will seek to modify or terminate them. Under the Eleventh Circuit's rule, every motion to modify risks triggering an intervention and a subsequent fee petition.

Environmental litigation is another common source of fee disputes for the States. The States often defend environmental statutes and regulations from "both sides"—on the one hand, against environmental groups and concerned citizens who claim the regulations are too lax, and on the other hand, against claims brought by industry groups who assert that the regulations are too onerous. Again, Congress has enacted provisions in the environmental statutes that allow for fee-shifting. *See* 33 U.S.C. § 1365(d) (Clean Water Act); 42 U.S.C. § 7607(f) (Clean Air Act).

A State frequently has to defend its laws or regulations or litigate an injunction in one or more of these areas where it is aligned with some other party in the case. Under the Eleventh Circuit's rule, that

aligned party could then make a claim for attorneys' fees against a prevailing State. For example, in this Court's recent decision in *New York State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 794 (2008), the New York County Democratic Committee, New York Republican State Committee, Associations of New York State Supreme Court Justices in the City and State of New York, as well as the State Association's president, intervened with the State Board of Elections to defend the constitutionality of the method of selection for party nominees. When insurers challenged, on constitutional grounds, a Texas law prohibiting insurance companies from operating and owning body shops, the state defendants found themselves aligned with two intervenors: the Automotive Service Association, a national organization of auto body shops, and Consumer Choice in Auto Body Repair. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 154 n.1 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008). As the case at bar illustrates, a State seeking to modify or dissolve an injunction may find itself aligned with an individual plaintiff or any of a number of other concerned parties. Consider, for example, *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 541 (6th Cir. 1982), in which the local firefighters union intervened on the side of the City to protect its members' interests in modifying a consent decree governing the City's hiring practices.

So too when industry attacks a State's environmental law, the State may be aligned with public interest organizations. Conversely, when an

environmental advocacy group challenges a State law or regulation, the State often will find itself litigating alongside particular industry or farming groups. The alignment of parties in *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004), illustrates this phenomenon. There, the Coalition for Clean Air, the Natural Resources Defense Council, Communities for a Better Environment, the Planning and Conservation League, and the Sierra Club were all aligned with a regional government agency in California. *Id.* at 251 n.4.

The simple fact is that in litigation implicating the more than 200 attorneys' fee statutes, the States often will find themselves aligned with a wide variety of advocacy groups, political parties, business entities, and interested individuals. The Eleventh Circuit's rule opens up the States to fee liability, even to aligned co-parties, and even when the State prevails.

The scenario faced by Alabama in the case at bar, in which a State litigating alongside an aligned party was forced to pay that party's bill, is one the States face with increasing frequency. Adding to this dynamic is the fact that the rule adopted by the Eleventh Circuit encourages litigants and their lawyers to "piggyback" on a State's litigation in an effort to generate and then claim fees. Because the scenario that unfolded in the courts below is one that the States often confront, the issue presented in the petition is of great practical significance to the States.

III. AWARDING ATTORNEYS' FEES AGAINST A STATE THAT WAS ALIGNED WITH THE FEE CLAIMANT WOULD CONTRADICT THE PURPOSES BEHIND ATTORNEYS' FEE-SHIFTING STATUTES.

A. The "private attorney general" rationale does not apply when the State seeks the same relief sought by an aligned private litigant.

In providing for attorneys' fees for a prevailing party, Congress sought to enable citizens to act as "private attorneys general" by ensuring they had access to counsel. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (observing that Congress meant to promote a role for citizens as "private attorneys general" in enacting 42 U.S.C. § 1988). With respect to § 1988, the Senate Report provided that

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

S. Rep. No. 94-1011, p. 2 (1976). The House Report likewise notes that "[i]n many instances where [civil rights] laws are violated, it is necessary for the citizen to initiate court action to correct the illegality." H. Rep. No. 94-1558, p. 1 (1976). "Because a vast majority of the victims of civil rights violations cannot

afford legal counsel, they are unable to present their cases to the courts." *Id. See also* 122 Cong. Rec. 35128 (1976) (remarks of Rep. Seiberling) ("Unless you can get adequate legal representation, the civil rights laws are just a lot of words"); *id.* at 33313 (remarks of Sen. Tunney) ("Unless effective ways are found to provide equal legal resources, the Nation must expect its most basic and fundamental laws to be objectively [sic] repealed by the economic fact of life that the people these laws are meant to benefit and protect cannot take advantage of them. Attorneys' fees have proved one extremely effective way to provide these equal legal resources. . . . ").

Importantly, the need for a "private attorney general" to police violations of the law is either nonexistent or minimal where the State—often, through the *actual* attorney general—is seeking the same relief. When the State is devoting its resources to obtaining the very relief the plaintiff seeks, the private litigant already has a champion. In that circumstance, a fee award is not justified.

B. The notion of "just desserts" cannot justify a fee award when the State has not violated the rights of the aligned party.

One foundation of fee-shifting statutes is the notion that assessing attorneys' fees is justified because the party who is forced to pay has inflicted some wrong on the party seeking the fees. The Senate

noted in its report regarding § 1988 that "[i]f private citizens are to be able to assert their civil rights, and if *those who violate the Nation's fundamental laws* are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in Court." S. Rep. No. 94-1011, p. 2 (1976) (emphasis added). Similarly, the House Report noted that fee-shifting was necessary to help the plaintiff "correct the illegality." H. Rep. No. 94-1558, p. 1 (1976). This Court's cases reflect the same premise—that forcing a party to pay attorneys' fees must satisfy "ordinary conceptions of just returns" and "intuitive notions of fairness." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). *See also Kentucky v. Graham*, 473 U.S. 159, 165 (1985) ("[w]here a defendant has not been *prevailed against* . . . § 1988 does not authorize a fee award against that defendant."); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (noting an equitable principle that justifies an award of attorneys' fees is that "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against *a violator of federal law*") (emphasis added).

Consistent with this common-sense notion, this Court repeatedly has concluded, including most recently in *Sole v. Wyner*, 127 S. Ct. 2188 (2007), that the *loser* in litigation should not be permitted to recover fees from the *winner*. The Court has observed that "ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that

defendant to pay the costs of the wholly unsuccessful suit against it." *Ruckelshaus,* 463 U.S. at 685. By the same token, the State should not have to pay fees to a party whom it never wronged—let alone one whose cause the State has actively supported in the underlying litigation. Where, as in this case, the State has not wronged an aligned fee seeker, the State should not be forced to pay that party's attorneys' fees.

IV. THE REASONING OF THE EIGHTH AND ELEVENTH CIRCUITS LACKS ANY HISTORICAL BASIS AND CONTRAVENES CONGRESSIONAL INTENT.

A. The reasoning of the Eighth and Eleventh Circuits ignores the historical backdrop against which attorneys' fee-shifting statutes were enacted.

The determination by the Eighth and the Eleventh Circuits to award fees against aligned, prevailing parties ignores the historical backdrop that gave rise to attorney fee-shifting provisions. Congress enacted § 1988—and a host of other fee-shifting statutes—in direct response to this Court's decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247 (1975). *See Hensley*, 461 U.S. at 429 (noting that § 1988 was enacted in response to the *Alyeska* decision). The plaintiffs in *Alyeska* sought to block the construction of the trans-Alaska oil pipeline, but their lawsuit ultimately was mooted by legislation. *Alyeska,* 421

U.S. at 244-45. The Ninth Circuit nevertheless concluded that the plaintiffs were entitled to attorneys' fees. *Id.* at 245-46. This Court, after a careful review of the historical principles underlying fee-shifting, reversed this award of fees. This Court concluded that the longstanding practice under the "American Rule" was that the "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id.* at 247. The Court contrasted the practice under the American Rule with the way attorneys' fee awards had developed in England. *Id.* The Court discussed the deep historical roots of these two approaches, noting that for centuries English courts had assessed attorneys' fees against the loser in litigation, whereas the American Rule dated back to 1796. *Id.* at 247-51. This Court declined to fashion on its own a far-reaching exception to the American Rule. *Id.* at 247, 269.

Because Congress enacted § 1988 in direct response to *Alyeska*, it was surely aware of these two historical paradigms. There is no support in the text or legislative history of § 1988 for the notion that Congress intended to usher in *sub silentio* some ahistorical departure from both the American Rule and the English tradition by permitting courts to assess attorneys' fees *against* a prevailing party. Where one party is vindicated, as the State was here, it should not be forced to pay attorneys' fees, either to the loser or to an aligned party.

B. Congress makes its intent plain when departing from longstanding practice.

The Eighth and Eleventh Circuits have concluded that a litigant can obtain attorneys fees against a prevailing State on the basis of some "contribution" made to the litigation by a litigant who is aligned with the State. Setting aside the tremendous practical problems that rule raises—and the litigation explosion it will detonate—the court's holding constitutes a radical departure from the two dominant historical approaches to attorneys' fees. Had Congress intended such a dramatic break with tradition, it would have made its intent clear. In a comparable context, this Court found that "[i]f Congress had intended the truly radical departure from the American and English common law and countless fee-shifting statutes that the [court of appeals] attribute[d] to it, it would no doubt have used explicit language to this effect." *Ruckelshaus*, 463 U.S. at 685 n.7. The Court noted in *Ruckelshaus* that where Congress desires to jettison settled models and chart a new course, it knows how to do so. *See id.* (noting that in 15 U.S.C. § 2605(c)(4)(A)(i), Congress authorized an attorneys' fee award if a party "represents an interest which would substantially contribute to a fair resolution of the issues"). Where Congress has not included "contribution" language into a fee-shifting statute, courts should not judicially add that gloss simply to achieve what they perceive to be a "fair" result. Congress clearly did not enact attorneys' fee statutes to serve as a "'relief fund for

lawyers.'" *Hensley,* 461 U.S. at 446 (Brennan, J., concurring in part and dissenting in part) (quoting 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy)). The Eleventh Circuit's rule creates just such a fund.

CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for Certiorari should be **GRANTED**.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

STEPHEN R. MCCULLOUGH
State Solicitor General

WILLIAM C. MIMS
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the Commonwealth of Virginia

October 17, 2008

[Additional Counsel Listed On Inside Of Cover]